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Necroria Holdings Sdn Bhd v Sazean Development Sdn Bhd & Anor

B HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCVC-5–01 OF 2018
SM KOMATHY J
10 MAY 2019

C *Contract — Termination — Validity — Termination of sale and purchase agreement and renovation agreement by defendants — Plaintiff failed to pay balance purchase price — Whether plaintiff contractually obliged to make payment by cheque — Whether defendants ought to have furnished bank account number to plaintiff to enable it to make payment — Whether plaintiff entitled claim for damages for loss of bargain*

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The plaintiff entered into a sale and purchase agreement ('the SPA') with the first defendant for the purchase of a house. At the same time, the plaintiff had also entered into a renovation agreement with the second defendant to renovate the said house. The plaintiff had made part payment for the purchase and renovation of the house. The dispute in the present case was in relation to the balance of purchase price of the house as well as the balance of payment for the renovation work whereby the defendants had issued two notices of demand to the plaintiff requiring the latter to pay the balance of payment. Due to the failure of the plaintiff to make the said payment, the defendants had terminated both the SPA and the renovation agreement and subsequently, sold the said house to a third party. The plaintiff's case was that the notices of termination were invalid as the defendants was not given reasonable opportunity to make the payments sought in the defendants' notices. The plaintiff argued that the plaintiff had sought the defendant's account number to make payment, but its emails were ignored, as such, the defendants were not entitled to terminate the agreements by reason of their conduct. The defendants' case was that the plaintiff was contractually obliged to make payment by way of cheque and not via bank transfer or internet banking. The defendants submitted that the notices of termination were valid as the plaintiff failed to pay the sums demanded within the time frame given. The issues arose were: (a) whether the plaintiff was contractually obliged to make payment by cheque; (b) whether the defendants ought to have furnished their bank account number; and (c) the quantum of damages.

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Held, allowing the plaintiff's claim with costs of RM20,000:

(1) The sale and purchase agreement did not specify the mode of payment. Neither did the notices of demand issued to the plaintiff specify that

payment was to be made by cheque. Many of the payments the plaintiff made to the defendants were by cash transfers from its bank and internet banking without any objection from the defendants. The defendants' official receipt had a column for various modes of payment such as cash, cheque or credit card. The defendant's reliance on the progress billing notices was misconceived as they were not issued to the plaintiff but HSBC. It was common knowledge that in conveyancing practice a bank would make payments only by way of cheque. The defendant's contention was without basis and rejected (see paras 15–16).

(2) The plaintiff's witness testified that because of the lapse of time, it had trouble locating the defendants account number, and for this reason repeatedly sought for the account number on receipt of the notices of demand demanding payment within 14 days. The plaintiff's inability to pay the monies within the time frame was occasioned by the defendant's refusal to provide the particulars required and rendered the notice of termination invalid. There was merit in the plaintiff's submission and it was accepted by the court. The defendants were in breach of the contract when the property was sold to a third party (see paras 18–19).

(3) In a case where a vendor of a land was in breach of a sale and purchase agreement, the purchaser was entitled to recover not only the deposit with interest and expenses, but the loss of his bargain. The loss of bargain was the market value of the property at the contractual time for completion less the contract price. Where the property was resold to a third party, it could be taken as prima facie evidence of the market value. The object of damages was to compensate the innocent party and to put it in the position that it would have been in had the contract been performed. Therefore, a plaintiff must show that he had suffered some loss or damage before compensation could be awarded. The plaintiff here must show that it had suffered some loss or damage before compensation could be awarded. The court agreed with the plaintiff's contention which was that it suffered loss and the loss was the loss of bargain which it would have made if there was no breach — the loss being the difference between the contract price and the price at which the property was eventually sold. In the result, the plaintiff was entitled to recover the sum of RM232,425.10 which it paid to the defendants under the two agreement and as damages for loss of bargain a sum of RM351,112 being the difference the contract price and the price at which the property was eventually sold (see paras 24–26).

[Bahasa Malaysia summary

Plaintif memeterai perjanjian jual beli ('PJB') dengan defendan pertama untuk pembelian sebuah rumah. Pada masa yang sama, plaintif juga telah memeterai perjanjian pengubahsuaian dengan defendan kedua untuk mengubahsuai rumah tersebut. Plaintif telah membuat sebahagian pembayaran untuk

pembelian dan pengubahsuaian rumah. Pertikaian dalam kes ini adalah berkaitan dengan baki harga pembelian rumah serta baki pembayaran untuk kerja-kerja pengubahsuaian di mana defendan telah mengeluarkan dua notis tuntutan kepada plaintif yang menghendaki plaintif membayar baki pembayaran. Oleh kerana kegagalan plaintif membuat bayaran tersebut, defendan telah menamatkan kedua-dua PJB dan perjanjian pengubahsuaian dan kemudian menjual rumah tersebut kepada pihak ketiga. Kes plaintif adalah bahawa notis penamatan tidak sah kerana defendan tidak memberi peluang yang munasabah untuk membuat pembayaran yang diminta dalam notis defendan. Plaintif berhujah bahawa plaintif telah meminta nombor akaun defendan untuk membuat pembayaran, tetapi e-melnya tidak diendahkan, oleh itu, defendan tidak berhak untuk menamatkan perjanjian itu disebabkan oleh kelakuan mereka. Kes defendan adalah bahawa plaintif telah berkewajiban secara kontrak untuk melakukan pembayaran melalui cek dan bukan melalui pemindahan bank atau perbankan internet. Defendan berhujah bahawa notis penamatan adalah sah kerana plaintif gagal membayar jumlah yang diminta dalam jangka waktu yang diberikan. Isu-isu yang timbul adalah: (a) sama ada plaintif telah berkewajiban secara kontrak untuk membuat pembayaran melalui cek; (b) sama ada defendan sepatutnya telah memberikan nombor akaun bank mereka; dan (c) kuantum ganti rugi.

Diputuskan, membenarkan tuntutan plaintif dengan kos RM20,000:

(1) Perjanjian jual beli tidak menyatakan cara pembayaran. Notis tuntutan yang dikeluarkan kepada plaintif juga tidak menyatakan bahawa pembayaran perlu dibuat dengan cek. Kebanyakan pembayaran plaintif yang dibuat kepada defendan adalah melalui pemindahan wang tunai dari bank dan perbankan internet tanpa sebarang bantahan daripada defendan. Resit rasmi defendan mempunyai lajur untuk pelbagai mod pembayaran seperti tunai, cek atau kad kredit. Kebergantungan defendan terhadap perkembangan notis bil telah salah difahami kerana ianya tidak dikeluarkan kepada plaintif tetapi HSBC. Adalah pengetahuan umum bahawa dalam amalan konveyansing sebuah bank akan membuat pembayaran hanya melalui cek. Pendapat defendan adalah tanpa dasar dan ditolak (lihat perenggan 15–16).

(2) Saksi plaintif memberi keterangan bahawa kerana laput masa, dia mempunyai masalah mencari nombor akaun defendan, dan untuk alasan ini berulang kali mencari nombor akaun apabila menerima notis permintaan tuntutan pembayaran dalam masa 14 hari. Ketidakupayaan plaintif untuk membayar wang dalam tempoh masa adalah disebabkan oleh keengganan defendan untuk memberikan butir-butir yang diperlukan dan menjadikan notis penamatan tidak sah. Terdapat merit dalam hujahan plaintif dan ia diterima oleh mahkamah. Defendan telah melanggar kontrak apabila harta tersebut dijual kepada pihak ketiga (lihat perenggan 18–19).

(3) Dalam kes di mana penjual tanah melanggar perjanjian jual beli, pembeli berhak untuk mendapatkan bukan sahaja deposit dengan faedah dan perbelanjaan, tetapi ganti rugi untuk kehilangan tawar-menawar. Kerugian tawar-menawar adalah nilai pasaran harta tanah pada masa kontrak untuk penyelesaian kurang harga kontrak. Kehilangan tawar-menawar adalah nilai pasaran harta pada masa kontrak untuk penyelesaian kurang harga kontrak. Jika harta tersebut dijual semula kepada pihak ketiga, ia boleh diambil sebagai bukti prima facie mengenai nilai pasaran. Objektif ganti rugi adalah untuk memampas pihak yang tidak bersalah dan meletakkannya dalam kedudukan bahawa ia akan berada dalam kontrak sepatutnya dilakukan. Oleh itu, plaintif mesti menunjukkan bahawa dia telah mengalami kerugian atau kerosakan sebelum pampasan boleh diberikan. Plaintif mesti menunjukkan bahawa dia telah mengalami kerugian atau kerosakan sebelum pampasan boleh diberikan. Mahkamah bersetuju dengan pendapat plaintif yang mana dia mengalami kerugian dan kerugian tersebut adalah kehilangan tawar-menawar yang akan dibuat sekiranya tiada pelanggaran — kehilangan tersebut adalah perbezaan antara harga kontrak dan harga di mana harta itu akhirnya dijual. Oleh itu, plaintif berhak memperoleh semula jumlah sebanyak RM232,425.10 yang dibayar kepada defendan di bawah kedua perjanjian tersebut dan sebagai ganti rugi untuk kehilangan tawar-menawar berjumlah RM351,112 sebagai perbezaan harga kontrak dan harga di mana harta tersebut akhirnya dijual (lihat perenggan 24–26).]

Notes

For cases on validity, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7563–7579.

Cases referred to

Hadley and another v Baxendale and others [1843–60] All ER Rep 461 (refd)

Legislation referred to

Contracts Act 1950 s 74

Ben Lee Kam Foo (Nabilah Zakaria with him) (Gan & Zul) for the plaintiffs.
Kassim bin Ludin (Aznim bt Azhar with him) (S Ravichandaran & Anuar) for the defendants.

SM Komathy J:

THE TRIAL

[1] This is the trial of an action by Necroria Holdings Sdn Bhd, the plaintiff, against Sazean Development Sdn Bhd and Sazean Engineering &

Construction Sdn Bhd, the first and second defendants. The plaintiff's claim arises from a sale and purchase agreement and renovation agreement it had entered into with the first and second defendants, respectively. The plaintiff seeks specific performance of both agreements, and in the alternative damages in lieu of specific performance.

WITNESSES

[2] The plaintiff called one and the defendants called two witnesses. There was no serious dispute on the facts.

THE FACTS IN OUTLINE

[3] The facts as outlined below were all agreed or not disputed, save if indicated otherwise.

[4] On 28 December 2011, the plaintiff entered into a sale and purchase agreement to purchase a three storey terrace house ('the property') for RM648,888 from the first defendant. On the same date, it also entered into an upgrading agreement with the second defendant to renovate the property according to the specifications set out in the first schedule of the said agreement for RM50,000. Under the sale and purchase agreement the first defendant was required to deliver vacant possession of the property within 24 months from the date of the agreement ie by 28 December 2013.

[5] HSBC Bank Malaysia Bhd ('HSBC') agreed to partly finance the plaintiff's purchase of the property for RM454,221.60 subject to the terms and conditions stated in its letter of offer dated 23 May 2013. The letter provided that the loan facility would expire in March 2015.

[6] The plaintiff paid 30% of the purchase price amounting to RM194,666.40, being the differential sum in the sale and purchase agreement, and another further sum of RM37,758.70 under the upgrading agreement. These payments were made to the respective defendants by bank transfer and internet banking.

[7] There was considerable delay in the construction of the property. In January 2015, the defendants wrote to HSBC for the loan to be disbursed and enclosed the architect's certificate. Following that, the defendants issued several notices of progress billing to HSBC requesting for payment. The notices were dated 12 March 2015, 5 June 2015 and 30 June 2015. However, the loan facility had expired before the monies could be disbursed to the defendants. As a result, from 9 July 2015–9 March 2016, the defendants entered into talks with HSBC to resolve the problem. However, HSBS declined to disburse and

allow the drawndown of the loan facility.

[8] Thereafter, the defendants' sought an indication from the plaintiff as to how it intended to settle the balance purchase price. The plaintiff proposed that the defendants set off the balance purchase price from the liquidated and ascertained damages payable to it in respect of another property it had purchased from the first defendant in another phase of the same project. The defendants did not agree. By email dated 21 November 2016, the defendants notified the plaintiff that a meeting scheduled to take place to discuss payment of the balance purchase price was postponed as the defendants representative was on emergency leave. No further meetings were arranged thereafter, and the defendants also did not issue any notices to the plaintiff to pay the balance amounts outstanding.

[9] In early 2017, the plaintiff received the two notices of demand both dated 20 February 2017, from the first and second defendants, respectively, requiring the plaintiff to pay the outstanding balance of RM288,978.89 and RM8,760.25 within 14 days from the date of the notices. Whereupon, the plaintiff sent emails to the defendants on 2 March 2017, 3 March 2017, and 7 March 2017, to request for their bank account number to bank in the sums of monies demanded. The defendants did not respond. The defendants by two letters each dated 16 March 2017, terminated the sale and purchase and upgrading agreement.

[10] The first defendant subsequently sold the property to a third party for RM1m on 22 May 2017. It was sold by way of contra to one of its contractors to whom it owed monies for work done.

CASE FOR THE PLAINTIFF

[11] It was the plaintiff's case that the notices of termination were invalid as the defendants was not given reasonable opportunity to make the payments sought in the defendants' notices. The plaintiff had sought the defendant's' account number to make payment but its emails were ignored. The defendants were not entitled to terminate the agreements by reason of their conduct.

CASE FOR THE DEFENDANTS'

[12] It was the defendants case that the plaintiff was contractually obliged to make payment by way of cheque and not via bank transfer or internet banking. The defendants maintained the plaintiff's request for their bank account number was intended to stretch the 14 days time stipulated in the notices of demand. The notices of termination were valid as the plaintiff failed to pay the sums demanded via the notices of demand within the time frame given.

A ISSUES TO BE TRIED

[13] The issues to be tried here were:

(a) whether payment of the balance purchase price under the two agreements was by way of cheques;

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(b) if no, whether the defendants ought to have furnished their bank account number to the plaintiff to enable it to make payment; and

(c) if yes, the quantum of damages.

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WHETHER WAS CONTRACTUALLY OBLIGED TO MAKE PAYMENT BY CHEQUE

[14] It was the defendants' contention that the mode of payment of the balance purchase price under the sale and purchase agreement was by way of cheque. They relied on the progress billing notices which stipulated that payment was to be made by way of cheque.

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[15] I find the submission to be without substance. There sale and purchase agreement did not specific the mode of payment. Neither did the notices of demand issued to the plaintiff specify that payment was to be made by cheque. Next, and crucially many of the payments the plaintiff made to the defendants were by cash transfers from its bank and internet banking without any objection from the defendants. Interestingly, the defendants' official receipt had a column for various modes of payment such as cash, cheque or credit card. The defendants reliance on the progress billing notices is misconceived as they not issued to the plaintiff but HSBC. It is common knowledge that in conveyancing practice a bank would make payments only by way of cheque.

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G **[16]** The defendants contention is without basis and I reject the same.

WHETHER THE DEFENDANTS OUGHT TO HAVE FURNISHED THEIR BANK ACCOUNT NUMBER

H **[17]** On this issue, the defendants contended that as the plaintiff had made numerous payments to them via internet banking, the latter's conduct in requesting for the account number after receiving the notices of demand, was intended to delay the payment demanded. There was consequently no obligation on the defendants to furnish their bank account.

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[18] In response, the plaintiff contended that it's director who was in charge of this purchase was residing in Singapore at the material time, and this was, as acknowledged by the defendants witnesses, known to them. The last payment made by it to the defendants via bank transfer and internet banking was on

27 April 2015. The plaintiff's witness testified that because of the lapse of time, it had trouble locating the defendants account number, and for this reason repeatedly sought for the account number on receipt of the notices of demand demanding payment within 14 days. It was said that the plaintiff's inability to pay the monies within the time frame was occasioned by the defendants refusal to provide the particulars required and rendered the notice of termination invalid.

[19] In my view, there is merit in the plaintiff's submission and I accept it. It follows that the defendants were in breach of the contract when the property was sold to a third party.

DAMAGES

[20] The plaintiff elected to abandon its claim specific performance and seek damages instead when it emerged at the trial that the property had been sold to a third party. It sought as damages the difference between the contract price and market value of the property at the time it was sold to the third party.

[21] The defendants, on the other hand, contended that even if they were in breach of the agreements, the plaintiff was only entitled to a refund of the monies it had paid.

[22] The amount of damages to be awarded for breach of contract to sell land is governed by s 74 of the Contracts Act 1950, which is the statutory enunciation of the rule in *Hadley and another v Baxendale and others* [1843–60] All ER Rep 461.

[23] Section 74 of the Contracts Act 1950 reads:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which, naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> (3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.
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> Explanation — In estimating the loss or damage arising from a breach of

A contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

B **[24]** In a case where a vendor of a land is in breach of a sale and purchase agreement, the purchaser is entitled to recover not only the deposit with interest and expenses, but the loss of his bargain. The loss of bargain is the market value of the property at the contractual time for completion less the contract price. Where the property has been resold to a third party, this can be taken as prima facie evidence of the market value.

C **[25]** The object of damages is to compensate the innocent party and to put it in the position that it would have been in had the contract been performed. Therefore, a plaintiff must show that he has suffered some loss or damage before compensation can be awarded. Therefore, the plaintiff here must show that it has suffered some loss or damage before compensation can be awarded.
D The plaintiff's contention, with which I agree, was that it suffered loss and the loss was the loss of bargain which it would have made if there was no breach — the loss being the difference between the contract price and the price at which the property was eventually sold.

E **[26]** In the result the plaintiff is entitled to recover the sum of RM232,425.10 which it paid to the defendants under the two agreement and as damages for loss of bargain a sum of RM351,112, being the difference the contract price and the price at which the property was eventually sold.

F CONCLUSION

[27] Accordingly, there will be judgment for the plaintiffs for RM583,537.10 with interest as prayed for in the statement of claim. The
G defendants to pay costs of RM20,000 to the plaintiff.

Plaintiff's claim allowed with costs of RM20,000.

Reported by Mohd Kamarul Anwar

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